Jurisdictional Statement

81-1161

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CASE NO. _____

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

NEIL H. HIGHTOWER, Individually, et al.
Appellants

V.

GEORGE SEARCY, et al.
Appellees

ON APPEAL FROM THE U. S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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IN THE UNITED STATES SUPREME COURT

NEIL H. HIGHTOWER, Individually; EUGENE C. WILLIAMS, JIMMY L. ROGERS, RONALD W. VAN HOUTEN, FRANK VARNER, JR., ED BELL and STEWART DAVIS, individually and as President and Members of the BOARD OF EDUCATION OF THE CITY OF THOMASTON; REV. WILLIS WILLIAMS, JR., in his official capacity only as a member of the BOARD OF EDUCATION OF THE CITY OF THOMASTON, and their successors in office; and the BOARD OF EDUCATION OF THE CITY OF THOMASTON, GEORGIA,

Appellants

vs.

GEORGE SEARCY, VESTA HARP, MARTHA HARP and VIVIAN C. YORK, individually, and on behalf of all those similarly situated; and UPSON COUNTY CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Appellees

CASE NO. _____

JURISDICTIONAL STATEMENT

PART I

QUESTIONS PRESENTED BY THE APPEAL

(1) Whether or not the Court of Appeals erred in holding that the Plaintiffs' evidentiary burden of proof in racial discrimination cases involving the method of selecting the membership of a public board of education does not have to satisfy the principles established by this Court in the cases of CITY OF MOBILE v. BOLDEN, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47, (1980), WASHINGTON v. DAVIS, 426 U.S. 229, 96 S. Ct. 2040, 40 L. Ed. 2d 597, (1976), VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEVELOPMENT CORPORATION, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450, (1977), and WRIGHT v. ROCKEFELLER, 376 U.S. 52, 84 S. Ct. 60, 11 L. Ed. 2d 512, (1964).

(2) Whether the Court of Appeals erred in invalidating a state statute providing the method for selecting the membership of Appellant Board of Education

after holding the statute was constitutional on its face and apparently constitutional in its present application.

(3) Whether the Court of Appeals erred in concluding that a United States District Court is powerless to insure future constitutional operation of a state statute which is found to be constitutional on its face and constitutional in its present operation.

(4) Whether the Court of Appeals erred in concluding that the District Courts' findings were clearly erroneous when the District Court concluded the evidence failed to establish that the state statute providing how vacancies will be filled on Appellant Board of Education was motivated by a discriminatory purpose, and thus was not invalid under the Equal Protection Clause of the Fourteenth Amendment or under the Fifteenth Amendment to the Constitution of the United States.

PART II

PARTIES TO THE PROCEEDING

A list of the parties involved in this matter is set forth in the caption of the case, but as a matter of information for the Court there have been certain changes in the composition of the City of Thomaston Board of Education since the inception of this litigation, all of which occurred prior to the judgment of the Court of Appeals. The Appellant, Neil H. Hightower, is no longer a member of the Board, his seat having been filled by Appellant Rev. Willis Williams, Jr. The Appellant, Eugene C. Williams, is no longer a member of the Board, his seat having been filled by Mr. Albert Hinson. The Appellant, Jimmy L. Rogers, is no longer a member of the Board, his seat having been filled by Mrs. Kay Robinson.

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PART IV

OFFICIAL REPORTS

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A) is reported at 652 F.2d. 1003. The District Court opinion is not reported.

PART V

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

On March 23, 1979, the Plaintiffs, Appellees herein, as black citizens and voters of the City of Thomaston, Georgia, initiated this action against the City of Thomaston Board of Education and its members, Appellants herein, in the United States District Court for the Middle District of Georgia, contending that the composition of the Board and the method of electing the Board was invalid. Jurisdiction was asserted under §§1331(a), 1343(3) and (4), 2201 and 2202 of Title 28, United States Code, and under §1983 of Title 42, U.S.C.A.

After discovery was concluded, the parties submitted the case to the District Court for a decision on the merits based upon the record, and on June 27, 1980, the District Court entered

judgment in favor of Appellants (Appendix D), and from this judgment Appellees herein appealed to the United States Court of Appeals for the Fifth Circuit. On September 21, 1981, a panel composed of three Judges of the Court of Appeals entered an opinion, dissented to by one Judge, in part, (Appendix A), reversing the District Court and holding that although the statute creating the City of Thomaston, Georgia, Board of Education was constitutional on its face, it had been unconstitutionally operated, and the majority of the panel ordered the state statute involved invalidated. Judgment was entered by the United States Court of Appeals for the Fifth Circuit in accordance with the opinion on September 21, 1981. (Appendix C)

On October 5, 1981, the Appellants herein filed with the Court of Appeals a Suggestion of En Banc Consideration, and as of the time of the preparation of

this Jurisdictional Statement, no order has been issued thereon.

On October 9, 1981, the Appellants herein filed in the United States Court of Appeals for the Fifth Circuit a NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES. (Appendix E).

The appeal herein is authorized under the provisions of 28 U.S.C. §1254(2) which provides the United States Supreme Court with appellate jurisdiction at the behest of a party relying on a state statute held unconstitutional by a Court of Appeals. Here the Court of Appeals has invalidated a state statute, and as held by this Court in DUTTON v. EVANS, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213:

> "Since, as will appear, the Court of Appeals held that a Georgia Statute relied upon by the State at the trial was unconstitutional as applied, there can be no doubt of the right of appeal to this Court. 28 U.S.C. §1254(2)." (91 S. Ct. 210, at Page No. 213, Footnote No. 6)."

PART VI

STATUTE INVOLVED

GEORGIA LAWS 1933, Pages 1070-1108, at page 1100, as amended by GEORGIA LAWS 1978, Pages 3191-3194, at page 3192.

"Section 39. Be it further enacted, that there shall be established and maintained in the City of Thomaston, created by this Act, a system of public schools, to be established, conducted, and maintained as hereinafter prescribed.

"(a) The board of education for the said system of public schools shall consist of seven members, the term of office of which shall be seven years, with the senior member to be retired annually on the last Friday in May and not to be eligible for reelection within two years thereafter. The election to said board shall be by the board and vacancies created thereon by death, resignation or removal from the City of

Thomaston shall be filled immediately in said manner. The members of the board of education of the City of Thomaston shall, so long as said board elects to do so, constitute the Board of Trustees of R. E. Lee Institute, said institute being a legally chartered institution."

PART VII

STATEMENT OF FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS POSED

Prior to 1915, the City of Thomaston, Georgia, had no public school system, there existed only a private system known as R. E. Lee Institute. The minutes of the governing body of the City of Thomaston and of R. E. Lee Institute reflect that this private system was on the verge of failing due to financial difficulties. In 1915 the Georgia Legislature passed a statute (PART VI hereof) creating a public school system in Thomaston subject to ratification of the voters, which was

accomplished in 1918. This legislation provided that the city board of education would be comprised of the trustees of R. E. Lee Institute, that one member of the board would retire each year and his successor would be elected by the board. The City thereby acquired a going public school system and all its physical plant (in which the City high school is housed today) totally without cost. Thereafter the Trustees virtually ceased to function, they having met only twice since 1958 (once to quitclaim anything they owned to the City Board and once to amend their private charter to delete the word "white" in reference to students, there having never been any racial qualification, even in this private charter, as to board membership).

In 1979 a public referendum was held to determine whether the citizens desired to maintain their independent system as it is constituted or whether

they desired to merge it into the county system, and the vote was more than three to one to maintain the system as is.

The independent system has operated for a period of sixty-three years under the direction of its board, and has achieved a reputation for excellence throughout the State of Georgia. A desegregation of the City schools of Thomaston began in 1965, and was completed in 1970 without a lawsuit or court ordered integration. In 1978 the state legislature amended the statute creating the city school system to provide that the members of its board of education would continue as the Trustees of R. E. Lee Institute only for so long as they desired to do so.

In March of 1979 the Plaintiffs, as black citizens and registered voters of the City of Thomaston, brought suit against the City of Thomaston Board of Education and its members, alleging that

the composition and method of selecting the board were unconstitutional. Subsequent to the filing of that lawsuit, a named Plaintiff in the case, Reverend Willis Williams, was selected to serve as a member of the Board, the Board adopted a resolution establishing publicly a policy of actively seeking to insure that all segments of the community which it served would be adequately and properly represented in its membership, and the first female member is now serving.

The Appellants herein contended before the trial court that the statute creating the City of Thomaston Board of Education was constitutional in its inception and in its operation. Further, the Appellants contended that under the principles established in a line of cases by this Court it was incumbent upon the Plaintiffs, Appellees herein, to carry the burden of proof

necessary to prove to the Court that the state statute providing the manner in which the members of the Board would be selected was motivated by a racially discriminatory purpose. The trial court concluded that the statute creating the City of Thomaston Board of Education was constitutional, and that the Plaintiffs had failed to prove the method of electing the membership of the board was conceived or operated to purposely further racial discrimination.

From the ruling of the trial court, the Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit, and a Panel of that Court concluded the statute was constitutional on its face, but that it had been operated in an unconstitutional manner. A majority of the Panel, while recognizing the present board of education had arguably eliminated any existing discrimination, and had actively begun to pursue a

policy of affirmative action, concluded that the federal courts did not have sufficient powers to insure future constitutional operation and ordered the statute creating the board invalidated. The dissenting opinion, while agreeing that the statute was constitutional, but had been unconstitutionally applied, contended that invalidation of the statute would be improper, since the equitable powers of the federal courts were sufficiently broad to insure future constitutional application. Further, the dissenting opinion pointed out that the election by the present board of a black member, together with its adopted public policy of affirmative action, opened an avenue for the development of a remedy by the district court to insure future constitutional application.

PART VIII

WHY QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

The opinion of the Court of Appeals directly conflicts with a line of cases culminating with CITY OF MOBILE v. BOLDEN, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47, decided by this Court in 1980, as the Fifth Circuit holds that the principles on which CITY OF MOBILE v. BOLDEN, supra, was decided relating to the burden of proof in racial discrimination cases are not controlling in non-election cases. This holding ignores the fact that the three principal cases on which the MOBILE decision was founded, WRIGHT v. ROCKEFELLER, 376 U.S. 52, 84 S. Ct. 63, 11 L. Ed. 2d 512 (1964), WASHINGTON v. DAVIS, 426 U.S. 288, 96 S. Ct. 2040, 40 L. Ed. 2d 597 (1976), and VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING CORPORATION, 429

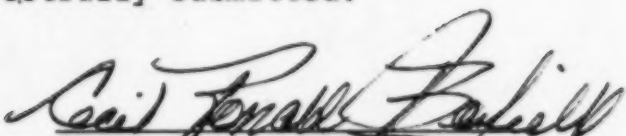
U.S. 252, 97 S. Ct. 555 (1977), 50 L. Ed. 2d 450, are all non-election cases.

The present posture of this case creates a dangerous and far-reaching precedent as the Court of Appeals has conceded that the trial court correctly concluded that the state statute involved was facially constitutional, but held that because it had been unconstitutionally operated it shall be invalidated, despite the availability of the broad remedial powers of the federal courts to insure future constitutional operation in the face of present constitutional operation. As written the decision of the Court of Appeals will authorize the courts to invalidate any statute which, though constitutional in its form and adoption, has been applied in any manner construed to be violative of the Constitution without resorting to corrective measures. This Court has established through a long line of

precedents that the equitable powers of the federal courts to remedy past wrongs and to insure future constitutional compliance are extremely broad, and the invalidation of a state statute is the absolute last resort in seeking constitutional compliance (CARTER v. JURY COMMISSION OF GREENE COUNTY, 396 U. S. 320, 90 S. Ct. 518, 24 L. Ed. 2d 549, TURNER v. FOUCHE, 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567.) The decision of the Court of Appeals directly contravening these precedents should not be permitted to stand. The decision of the Court of Appeals requires in effect that the Appellants have enacted a new statute constitutional on its face, while simultaneously holding that the present statute is constitutional on its face; what possible difference could there be in the powers of the federal courts to require constitutional application of a new statute as opposed

to constitutional application of the present statute.

Respectfully submitted.



CECIL RONALD BARFIELD
BY CECIL RONALD BARFIELD AND
DAVID BRUCE DUNAWAY

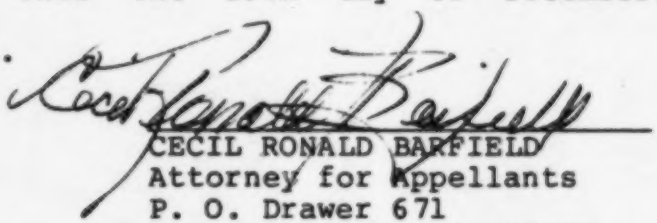
CERTIFICATE OF SERVICE

I, CECIL RONALD BARFIELD, Attorney for the Appellants, do hereby certify that I have served the Appellees with three copies of the within and foregoing Jurisdictional Statement by mailing same in a properly addressed envelope with proper postage affixed thereon to Laughlin McDonald, 52 Fairlie Street, N.W., Atlanta, Georgia, 30303, Attorney of record for the Appellees. Further, I hereby certify that the constitutionality of a statute of the State of Georgia is drawn into question in this proceeding, that the State of Georgia is not a party to this proceeding, nor is any agency, officer or employee thereof, that the United States Court of Appeals for the Fifth Circuit has not, pursuant to 28 U.S.C. §2403(b) certified to the Attorney General the fact that the constitutionality of such statute of

the State was drawn into question, and as 28 U.S.C. § 2403(b) may be applicable I have served a copy of said Jurisdictional Statement upon Honorable Michael J. Bowers, Attorney General of the State of Georgia, by mailing same in a properly addressed envelope, with proper postage affixed thereon to Honorable Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Building, Atlanta, Georgia, 30334.

I further certify that all parties required to be served have been served.

This the 19th day of December, 1981.



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APPENDIX A

George SEARCY, etc., et al.,
Plaintiffs-Appellants,

v.

Eugene C. WILLIAMS, etc., et al.,
Defendants-Appellees.

No. 80-7517.

United States Court of Appeals,
Fifth Circuit.
Unit B

Sept. 21, 1981.

Appeal from the United States District Court for the Middle District of Georgia.

Before MORGAN, RONEY and KRAVITCH, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

This appeal arises out of a suit brought by black citizens who are registered voters in the City of Thomaston, Georgia, against the City of Thomaston Board of Education and its members. The plaintiffs challenged inter alia the composition and method of selection of the school board as violative of the

Fourteenth and Fifteenth Amendments and 42 U.S.C. §§ 1971(a)(1) and 1973. Ruling on the basis of submitted pleadings, affidavits, documents, and briefs, the district judge found for the defendants. Persuaded by the peculiar facts of the case, however, we find it necessary to reverse.

I. FACTUAL BACKGROUND

In 1915 in order to create a public school system for the City of Thomaston, the Georgia General Assembly passed a statute that created an independent school system from the then existing R. E. Lee Institute. 1915 Ga. Laws 848. R. E. Lee Institute was a private school incorporated in 1906 for the benefit of "white pupils and patrons;" however, its failing financial status in 1915 required that action be taken in order to ensure educational opportunities for the children of Thomaston. The enabling legislation that established the public

school system named R. E. Lee Institute's board of trustees (hereinafter the board) as the Thomaston Board of trustees (hereinafter Board of Education) and adopted the same method utilized by the former board for the subsequent election of members to the Board of Education. This method of selection provided that each year one board member would retire and that member, together with the remaining board, would elect the new board member. A referendum by the people in 1918 approved the legislation. The statute was reaffirmed in 1933 and amended in 1978; however, it has continued throughout the years to maintain its self-perpetuating form of election to the Board.

The members of the Thomaston Board of Education, in addition to their role as school board members, exist nominally as the board of trustees for the private corporation. However, since 1958 the

board as trustees has met only twice - once in 1974 to delete the word "white" from the phrase "white pupils and patrons" in the institute's charter, and again in 1977 to authorize the conveyance of all property owned by the institute to the Board of Education. After the board transferred the property to the Board of Education in 1978, the state amended the charter of the City of Thomaston to provide that the Board of Education would constitute the board of trustees only as long as the members chose to do so.

Steps toward desegregation in the City of Thomaston school system began in 1965; however, the dual school system that existed was not dismantled until September of 1970. Many of the school traditions of the all-white school, including the name R. E. Lee Institute, were adopted over those of the former all-black school. At the time this

lawsuit was filed, no black had ever served on the Thomaston Board of Education.[1] After the lawsuit was filed, a vacancy occurred on the Board and the members elected Reverend Willis Williams as the first black man to serve on the Board in its sixty-one year history. Shortly thereafter the Board also adopted a policy that it would not discriminate in filling further vacancies and that it would affirmatively seek to ensure that all segments of the community were represented on the Board. Subsequently, in a public referendum held in 1979 to determine whether the citizens of Thomaston preferred to consolidate the city school system with the county

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1. Indeed, the record reveals that a few families in Thomaston dominated the membership of the Board throughout the years, with the Hightower family placing six members on the Board, the Adams family placing five, and the Hinson, Varner and Thurston families placing two each.

school system, the public overwhelmingly voted to maintain the system as it existed. In June of 1980 the district judge issued his order, holding that the system for election to the school board was not inherently unconstitutional or unconstitutional in its creation or operation. The district judge further held that the Voting Rights Act, 42 U.S.C. §§1971(a)(1) and 1973, did not apply.

II. FOURTEENTH AMENDMENT CLAIMS

[1] Appellants first argue that the district judge erred in his ruling that the statute, enacted in 1915 and amended in 1978, naming the R. E. Lee Institute board of trustees as the Thomaston Board of Education and permitting the Board's self-perpetuation, is constitutional on its face. Their argument is that the legislation adopting the board of trustees as the Board of

Education necessarily mandated an all-white Board of Education because the institute's charter establishing the school for "white pupils and patrons" required that the trustees be white. Although appellants' logic leads to the conclusion that the Board of Education necessarily under the facts would have been lily-white, we disagree that the statute is unconstitutional on its face as requiring an all-white Board. The statute refers to the school as a "legally chartered school," but the legislation does not specifically incorporate any arguable requirement under the charter that the board be composed only of white members. The district court's ruling that the statute is facially constitutional was more than "technically correct" as conceded by the appellants; it was legally correct as well.

In their next line of attack the appellants argue that the statute is

discriminatory in purpose and effect and should therefore be struck down as unconstitutional in its application. Both the appellants and the district judge below rely primarily on a line of cases culminating in the recent Supreme Court decision of CITY OF MOBILE v. BOLDEN, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980), a case that required proof of a racially discriminatory purpose in a dilution case. However, before plunging into the most modern analysis involving purposeful discrimination, we find it useful to consider a case decided nearly one hundred years ago by the Supreme Court, but still relevant to our analysis today.

The case of YICK WO v. HOPKINS, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), involved a municipal ordinance that was racially neutral on its face, but administered in a manner that

clearly indicated a racially discriminatory motive. The ordinance prohibited the operation of laundries in the City of San Francisco without a special permit from a board of supervisors, unless the laundry was constructed of brick or stone. The facts reveal that out of 320 laundries in the city, 240 were owned by Chinese persons. All of the laundries in the city except for ten were constructed of wood, and thus were subject to the ordinance. The board of supervisors granted exceptions to all 80 of the non-Chinese laundry operators; however, permits were refused to the more than 200 Chinese applicants who sought exceptions to the ordinance. Id. at 358-359, 374, 6 S. Ct. at 1065-1066, 1073. Faced with such statistics in a case involving the actual administration of the ordinance, as opposed to the potential administration of the statute, the Court concluded:

[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil

> eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . .
>
> The fact of this discrimination is admitted. No reason for it is shown, and the conclusions cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified.

Id. at 373-374, 6 S. Ct. at 1072-1073. The Supreme Court made no effort to inquire into any specific purpose of enactment of the statute, finding that the facts required a conclusion of discrimination.

A more recent case relevant to our inquiry, and in some respects similar to YICK WO v. HOPKINS, supra, is TURNER v. FOUCHE, 396 U. S. 346, 90 S. Ct. 532, 24 L.Ed.2d 567 (1970). That case involved another challenge to a Georgia statutory method of selection of local school boards whereby the school board members were selected by the grand jury which was in turn selected from a list composed by a judge-appointed jury commission. The Supreme Court held that the system which granted discretion to the jury commissioners to exclude anyone not "upright" and "intelligent" was not unconstitutional on its face or unconstitutional as having no conceivable purpose or effect other than to permit the commissioners to discriminate against blacks. However, the Court held that the jury list actually composed by the jury commissioners revealed a substantial disparity between the number of Negroes on the list and the Negro

population in the county. This disparity was unexplained, particularly in light of the 171 blacks out of 178 persons disqualified for lack of intelligence or uprightness. These statistical disparities established a prima facie case of jury discrimination that the defendants failed to rebut, and thus the jury lists were declared unconsitutional under the Fourteenth Amendment.

[2,3] TURNER v. FOUCHE, supra, and YICK WO v. HOPKINS, supra, represent a line of cases in which statutes challenged as unconstitutional are constitutional in apparent purpose, but utilized in a manner to discriminate against a certain segment of the population. See L. Tribe, American Constitutional Law, Section 16-18, p. 1028 (1978). In these cases the fatal discriminatory purpose is inferred from the overwhelmingly convincing statistical evidence of unexplained disparity. See also CASTANEDA

v. PARTIDA, 430 U.S. 482, 97 S. Ct. 1272, 51 L.Ed.2d 498 (1977). The challenged application of the statute often involves discretion or subjective criteria utilized at a crucial point in the decision-making process. For example, in YICK WO v. HOPKINS the board of supervisors exercised absolute discretion in granting exceptions, and the jury commission in TURNER v. FOUCHE applied subjective criteria to create the jury list from which grand jury members were chosen.[2] These cases,

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2. In these cases, the administrative officials exercised a kind of discretion different from the discretionary power granted to elected public officials in making appointments to positions "with substantial policymaking importance." JAMES v. WALLACE, 533 F.2d 963 (5th Cir. 1976) Policymaking appointments of the latter type are those made by an elected official that are essential to carrying out the political mandate of the people. See MAYOR OF PHILADELPHIA v. EDUCATIONAL EQUALITY LEAGUE, 415 U.S. 605, 615, 94 S. Ct. 1323, 1330, 39 L. Ed.2d 630 (1974).

although not entirely on point with the present case, are relevant to our inquiry because the statute in the present case, based on overwhelming convincing statistics, has been discriminatorily applied for 61 years by the city school board acting as an arm of the state. The school board makes its own selection of new members to the Board, and the choice of new members is entirely subjective. The evidence that no black was chosen in a 61 year period is highly indicative of discriminatory administrative action. Thus, under the analysis of the discriminatory administration cases, the present case involves an unexplained prima facie case of discrimination.[3]

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3. A subtle issue hidden within the comparison of this case to a discriminatory administration case involves the question of what right of the people is protected by the Fourteenth Amendment in this case. Clearly, the appellants have no right to be appointed to the Board of Education.

The present case is unlike the discriminatory administration cases cited above in that those cases involve challenges to isolated particular actions. YICK WO v. HOPKINS, supra, involved the application of a criminal statute to the appellant, and TURNER v. FOUCHE, supra, involved a challenge to the composition of a jury list. This case involves

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However, as the Supreme Court stated referring to school board participation in TURNER v. FOUCHE, 396 U.S. 346, 362-363, 90 S. Ct. 532, 541-42, 24 L.Ed.2d 567 (1970), "the appellants ... do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal consitutional guarantees." Although the Supreme Court was discussing a freeholder requirement for appointment to the school board, the same right would exist where blacks were systematically excluded from participation on a school board that ostensibly has no actual requirements for membership, but rather depends entirely on the arbitrary discretion of the school board members.

discriminatory action "born in the iniquity" of a segregated school system, and perpetuated over a period of years by the school board's failure to appoint a black person to the Board until the time that this lawsuit was filed. For this reason, the appellants have challenged the statute as unconstitutional in application and seek to have the statute struck down. Apparently because the case involves a challenge to the system of selection to the school board, and systems may be struck down as discriminatory in impact, the appellants and the district judge below have analogized to the discriminatory impact cases, particularly CITY OF MOBILE v. BOLDEN, supra, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47. Although CITY OF MOBILE v. BOLDEN may be significant for analyzing when the discriminatory system may be struck down, it is important to keep in mind that the present case involves more

than a mere discriminatory impact where the statute is neutral on its face and in its administration. Any discriminatory impact in this case arises from the fact that discriminatory appointments[4] to the board have occurred systematically for the 61 years preceding this lawsuit. The proof of discriminatory purpose so difficult to muster in a discriminatory impact case is more readily apparent in a case such as this one involving overwhelming statistical evidence of discriminatory administration of a statute.

In the discriminatory impact cases, particularly those involving at-large elections as in CITY OF MOBILE v. BOLDEN, supra, the Supreme Court places

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4. See note 6 and accompanying text infra. As we discuss later in this opinion, the selection of school board members, although couched in terms of an "election," is actually for all practical purposes by appointment.

a heavy burden on the plaintiffs to show that the impact is in some manner related to a discriminatory purpose. In CITY OF MOBILE v. BOLDEN, supra, 446 U.S. at 66, 100 S. Ct. at 1499, the Court held that in a discriminatory impact challenge to an at-large election scheme the plaintiff must prove that the plan was "conceived or operated" purposefully to further discrimination.[5] In that case the Court found that the fact that no black had ever been elected to the city commission together with the historical evidence of discrimination, was insufficient to establish a prima facie case of discrimination.

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5. For a thorough discussion of the plurality opinion in CITY OF MOBILE v. BOLDEN, supra, see Judge Kravitch's opinion in McMILLIAN v. ESCAMBIA COUNTY, FLORIDA, 638 F.2d. 1239 (5th Cir. 1981), appeal filed, ____U.S., _____, ____S.Ct. _____, ____L.Ed.2d _____, 50 U.S.L.W. 3007 (U.S. May 19, 1981) No. 80-1946).

[4-6] The district court in the present case applied the analysis of CITY OF MOBILE v. BOLDEN, to support the conclusion that no illegal discrimination existed in the present case. However, in analogizing to CITY OF MOBILE v. BOLDEN in this manner, the district court failed to recognize a crucial distinction between election cases and non-election cases. The present case, although characterized by the appellants as an election case, is, according to our analysis, an appointment case. The legislation provides for the "election" of new Board members, but as in SAILORS v. KENT BOARD OF EDUCATION, 387 U.S. 105, 109, 87 S. Ct. 1549, 1552, 18 L.Ed.2d 650 (1967), a system by which a small number of elected or appointed persons select a school board (or fill its vacancies) is basically an appointive system. Appointed school board

systems are permissible under the Constitution[6] so long as the appointments are not made in a manner that systematically excludes an element of the population from consideration. Cf. MAYOR OF PHILADELPHIA v. EDUCATIONAL EQUALITY LEAGUE, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974). However, appointments other than those made to positions entrusted with carrying out particular policies of an elected official[7] can be scrutinized under the Fourteenth

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6. SAILORS v. KENT BOARD OF EDUCATION, supra, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650. We note, however, that the appointment system in this case is particularly unique in that once the initial Board "appointment" was made, the subsequent appointments to the Board were totally removed from public influence. Most appointive systems involve appointments by elected officials, or at least officials appointed by another elected official. See, E.G. MAYOR OF PHILADELPHIA v. EDUCATIONAL EQUALITY LEAGUE, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974); TURNER v. FOUCHE, supra; SAILORS v. KENT BOARD OF EDUCATION, supra.

7. See note 2 supra.

Amendment with a more jaundiced eye than can elections. Elections are a product of the general right to vote and may be affected by subtle factors unrelated to racial motives. In an election case, the fact that no black has ever been elected under a particular system of election does not necessarily reflect purposeful discrimination; whereas, in an appointment case, the fact that no black has ever been appointed to a particular position, offered without explanation, is an indicator of purposeful discrimination. The district court erred in its straightforward comparison of CITY OF MOBILE v. BOLDEN to the present case. Although CITY OF MOBILE v. BOLDEN may be relevant to the degree this case involves discriminatory impact, the straightforward comparison is too simplistic for the unique set of facts before the court today. A more discerning analysis is required.

[7-10] CITY OF MOBILE v. BOLDEN, supra, 446 U.S. at 66, 100 S.Ct. at 1499, requires that in a discriminatory impact case the plaintiff must show that the statute in question was "conceived or operated" as a purposeful device to further discrimination. As we have indicated, the discretionary element in the administration of the legislation in this case, together with the evidence of the manner in which the statute was actually administered, compels an inference of purposeful discrimination. The school board utilized the statute to exclude black participation on a school board that established educational policies for black and white students alike, and this obviously impacted unfairly on blacks. According to the Supreme Court's use of the disjunctive "or" in the phrase "conceived or operated," and according to our own language in McMILLAN v. ESCAMBIA COUNTY, FLORIDA,

638 F.2d 1239, 1244 (5th Cir. 1981), operation alone of a statute as a purposeful device to further discrimination may invalidate it. However, the historical evidence in this case of a segregated school system existing at the time this legislation created the school board out of a white private school indicates in the least that this system for selecting school board members was tainted with a segregative origin. This taint was not present in CITY OF MOBILE v. BOLDEN, supra or McMILLAN v. ESCAMBIA COUNTY, FLORIDA, supra, where the at-large election schemes in those cases were first utilized at a time when blacks were widely disfranchised and did not pose a political threat. Although discriminatory purpose was most likely not the sole purpose in establishing this method of selection for the Board, the historical reality of segregation at least suggests the possibility of a

racially discriminatory purpose. Furthermore, the tainted origin of the school board has been carried forward to the present day by the self-perpetuating method of selection to the Board. Regardless of whether the school board selection scheme was purposefully conceived to further discrimination, however, the system has clearly operated purposefully to further discrimination. We hold, therefore, that this unique system for selection of the school board that was operated in a discriminatory manner, together with the self-perpetuation of the Board of Education that originated from an all-white board of trustees, is violative of the appellants' rights under the Fourteenth Amendment.[8]

8. We emphasize the uniqueness of this system that was created from a board of trustees that was arguably required by charter to be all-white, and at least under the facts necessarily would have been all-white. The

III. REMEDY

Because we have held that the statute involved in this case has been applied in a manner that violates the Fourteenth Amendment it is unnecessary to consider the appellants' arguments based on the Fifteenth Amendment and the Voting Rights Act. However, as indicated in our opinion, this case involved an appointive rather than an elective scheme, and thus the district court was

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statute required this original Board to self-perpetuate in the sense that the Board chose its own new members. Although self-perpetuation is not per se unconstitutional, see BYRD v. CITY OF SAN ANTONIO, TEXAS, 587 F. 2d 184 (5th Cir. 1979), the self-perpetuation of this Board tainted with a segregative past violates our constitutional sense of fairness. We also suggest that the self-perpetuation of a board performing such an important government function as the one in this case might present different problems than the Public Service Board in BYRD v. CITY OF SAN ANTONIO, TEXAS, which merely performed the proprietory function of managing public utilities owned by the city. However, we reserve that matter for another day.

correct in holding that voting rights did not apply. Our only remaining task is to consider what action is necessary to remedy the constitutional violation.

[11,12] Ordinarily a case involving discriminatory administration of a statute would be remedied by eliminating the particular offensive activity and enjoining further discrimination. In this case, however, the offensive activity has occurred over a 61-year period, and at this present date the discrimination has arguably been corrected by the "voluntary" action[9] of the defendants

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9. Without intending to impugn the present school board's motive, we place little significance in the fact that a black person was appointed in the heat of this litigation. Rather than indicating a permanent change in the pattern that existed, the appointment of the black member suggests that indeed litigation was required to correct the situation, particularly in light of the fact that the Board was otherwise isolated from public pressure. See note 6 supra. See also KIRKSEY v. BOARD OF SUPERVISORS, 554 F. 2d 139, 146 (5th Cir. 1977)

in appointing a black person to the Board. Because this person has been appointed to the Board, we cannot order appointment of another black. However, because the appointment was made in the face of litigation, we have no assurance that the pattern of past discrimination is forever broken. We do not question the good faith of the current Board of Education in adopting its "affirmative action policy,"[10] but we are not satisfied that the discriminatory taint of the past has been sufficiently dissipated. An order simply enjoining future discrimination by the Board in its consideration of potential Board members is

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("[L]itigation was required to remove discrimination . . . and that litigation has worked.").

10. As indicated previously, the Board, after selecting its first black member, adopted a policy seeking to ensure that all segments of the population were represented on the Board and refraining from discriminating in filling further vacancies.

an ineffective remedy.[11]

Because the appellants have demonstrated to our satisfaction that this statutory scheme for selection to the board of education has been purposely and systematically utilized to exclude blacks from the opportunity to participate in the educational policy-making process, we find that the only effective remedy in this case is to invalidate the statute. When a statute is viewed as discriminatory in purpose and effect and its defects cannot be cured by an injunction

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11. We acknowledge the Supreme Court's holding in CARTER v. GREENE COUNTY, 396 U.S. 320, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970), that injunctive relief was sufficient in that case to remedy the wrongs of abused discretion; however, we find that the facts of this case in light of the specific history of segregation in the school systems distinguish it and suggest that "the law . . .was subsequently carried forward for the purpose of fostering racial discrimination." Id. at 336, 90 S. Ct. at 527.

prohibiting unfair application, the legislation may be deemed invalid per se. See LOUISIANA v. UNITED STATES, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965). Although this statute is not unconstitutional on its face, it originated out of a segregated school system and required that the initial Board of Education be established from an all-white school's board of trustees. The segregative effect of the past has been perpetuated by this statute that permitted the original all-white Board absolute discretion in choosing its own new members. CF. KIRKSEY v. BOARD OF SUPERVISORS, 554 F. 2d 139 (5th Cir. 1977). In order to dissipate the taint of the segregative past in this unique system of school board selection, we find it necessary to reverse the district court and invalidate this statute. Because a new selection method must be established by the state legislature, we

express no opinion concerning any new method of selection to the school board.[12] We reverse and remand to the district court with orders to retain jurisdiction over the case until a new system for selection is chosen.

REVERSED and REMANDED.

RONEY, Circuit judge, dissenting in part:

I respectfully dissent from the Part III Remedy portion of the Court's opinion. Nothing said therein can justify a federal court's requiring the state legislature to implement a new system for selection of school board members. The statute has been upheld as constitutional. Only its application was improper. Although the court has

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12. As we have stated, the appellants have no right to an elected school board. However, we note our reluctance in condoning a system as isolated from public influence as was the one in this case. See note 6 supra.

broad remedial powers, its task is simply to correct the condition that offends the Constitution. See SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, 402 U.S. 1, 15-16, 91 S. Ct. 1267, 1275-76, 28 L. Ed. 2d 554 (1971).

In a similar challenge to Alabama's jury selection statute, the Supreme Court upheld the statute but found its application to be discriminatory. CARTER v. JURY COMMISSION OF GREENE COUNTY, 396 U.S. 320, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970). Rather than invalidate the statute, the Court remanded the case back to the district court recognizing that "[t]he federal courts are not incompetent to fashion detailed and stringent injunctive relief that will remedy any discriminatory application of the statute at the hands of the officials empowered to administer it." Id. at 336-37, 90 S. Ct. at 527.

The district court should be left free to develop a remedy which would assure non-discriminatory appointment of Board members, an avenue of affirmative action already having been opened by the Board. An appropriate remedy structured on the present statute could well result in better representation of minority groups in the non-discriminatory selection of Board members, than if the existing statute is invalidated and the legislature adopts a method which, while constitutional, might well have the ultimate effect of replacing a now integrated Board with an all-white Board.

Having found the statute facially constitutional, the Court then goes too far by invalidating it as a remedy. The statutory scheme is not itself discriminatory. It is "capable of being carried out with no racial discrimination whatsoever." SMITH v. TEXAS, 311 U.S. 128, 130-31, 61 S. Ct. 164, 165-66, 85 L. Ed.

84 (1940) (footnote omitted); Carter, 396 U.S. at 335, 90 S. Ct. at 526. The case should be remanded to the district court to allow it to fashion a suitable remedy.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

CIVIL ACTION NO. 79-67-MAC

GEORGE SEARCY, et al.,

Plaintiffs

V.

EUGENE C. WILLIAMS, et al.,

Defendants

OWENS, District Judge:

The parties have agreed to submit this case to the court for a decision on the merits based on the pleadings, affidavits, documents and briefs on file. This order constitutes the court's findings of fact and conclusions of law. Rule 52, Federal Rules of Civil Procedure.

The City of Thomaston, Georgia, has a population of approximately 10,000 persons of whom, according to the 1970 census, about twenty percent are black.

Since 1915 city residents have attended city public schools operated as an independent public school district by and through the defendant Board of Education of the City of Thomaston, Georgia. It presently operates three elementary schools and one high school--R. E. Lee Highschool. Since 1970 these schools have been racially integrated.

In 1906 the R. E. Lee Institute of Thomaston, Georgia was incorporated as a private school "for white pupils and patrons." The institute was governed by a board of trustees which selected its own successors. In 1915 the Georgia General Assembly--the state legislature--created the Board of Education of the City of Thomaston to operate the public schools. 1915 Ga. Laws 848. The Board of Education was statutorily composed of the Board of Trustees of the R. E. Lee Institute and was and is self-perpetuating, i.e., each year one member

of the board retires and the members elect the successor. This legislation was racially neutral on its face. The R. E. Lee Institute then became a part of the public school system. Today it remains a viable entity in name only. The members of the Board of Education continue to be nominal trustees of the institute; however, the board has convened as the trustees of the institute only twice since 1958.

In 1974 the charter was legislatively amended to delete the white only qualifications for pupils and patrons. The school system, however, had been integrated for some years before 1974.

In 1978 the city charter was legislatively amended but retained the same self-perpetuating method of electing Board of Education members:

> "(a) The board of education for the said system of public schools shall consist of seven members, the term of office of which shall be seven years, with the senior member to be retired annually on the last Friday in May and

> not to be eligible for reelection within two years thereafter. The election to said board shall be by the board and vacancies created thereon by death, resignation or removal from the City of Thomaston shall be filled immediately in said manner. The members of the board of education of the City of Thomaston shall, so long as said board elects to do so, constitute the Board of Trustees of R. E. Lee Institute, said institute being a legally chartered institution."

1978 Ga. Laws 3191, 3192. It is this enactment that is under attack. Among the significant powers granted to the Board of Education are the power to take and hold property, "to acquire property by purchase," to build structures, "to borrow money for current expenses," to employ teachers and a superintendent and set their compensation and to make rules and regulations for the board's own governance and that of the superintendent, teachers and students. 1978 Ga. Laws 3191, 3192-93. On June 7, 1979, in a public referendum to decide whether the legislation creating the city's

independent public school system should be repealed and the city schools consolidated with the county's, the city electorate voted 1774 against and only 585 for repeal.

The plaintiff has introduced many specific instances of past racial discrimination in Thomaston but it is unnecessary to go into details. The court recognizes that segregation of the races was commonplace in Thomaston as well as most other areas of these United States for many years. With respect to the defendant Board of Education, no black was ever elected as a member of the board from 1915 until 1979. In May 1979 following this suit being filed, Rev. Willis Williams, one of the original black plaintiffs, was elected to the board.

The thrust of the plaintiffs' claim is that the legislatively enacted self-perpetuating method of electing school

board members works an exclusion of blacks from membership on the board. The issues presented by this case defy simple categorization into familiar constitutional and statutory claims; the court must therefore look to the most analogous situations for guidance in arriving at the issues and proper legal conclusion to be drawn from the facts.

With respect to the self-perpetuating method of electing members of the defendant board, the court notes that an appointive system of selecting members of an official body does not in itself offend the Constitution, particularly with regard to questions of malapportionment. See Hadley v. Junior College Dist., 397 U.S. 50, 58, 90 S. Ct. 791, 25 L. Ed. 2d 45, 52 (1970); Rosenthal v. Board of Education, 385 F.Supp. 223 (E.D. N.Y. 1974) aff'd mem. 420 U.S. 985, 95 S. Ct. 1418, 43 L.Ed.2d 667 (1975). The self-perpetuating

method also does not offend the Guaranty Clause. See Byrd v. City of San Antonio, Texas, 587 F.2d 184 (5th Cir.) cert. denied, __U.S.__, 100 S. Ct. 56, 62 L.Ed.2d 38 (1979).[1] The court, therefore, concludes that the self- perpetuating method of selecting the defendant Board of Education is not inherently illegal or unconstitutional. This conclusion is buttressed by Turner v. Fouche, 396 U.S. 346, 90 S. Ct. 532, 24 L.Ed.2d 567 (1970) in which it was unsuccessfully contended that election of board of education members by a Georgia

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1. The Byrd case involved a self-perpetuating Public Service Board. Among the plaintiffs' allegations was that the method of appointing members worked to perpetuate the discriminatory exclusion of blacks and Mexican-Americans from the board. By the time the case reached the court of appeals blacks and Mexican-Americans were represented on the board, and the court did not address the issue of discrimination. Likewise, in this case blacks are now represented on the Thomaston Board of Education but this court will, nevertheless, address the issue of discrimination.

county grand jury is inherently unfair or unconstitutional.

Notwithstanding the facial constitutional validity of the self-perpetuating method of electing board members, the plaintiffs assert that in practice black citizens of Thomaston have been denied membership and representation on the board in violation of the Equal Protection Clause of the Fourteenth Amendment. As to this contention their complaint is analogous to the denial of access to political process cases[2] which the plaintiffs apparently recognize by virtue of their reliance on Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.) (en banc), cert.

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2. Also analogous are the cases of Mayor of Philadelphia v. Education Equality League, 415 U.S. 605, 94 S. Ct. 1323, 39 L.Ed.2d 630 (1974) and James v. Wallace, 533 F. 2d 963 (5th Cir. 1976), involving alleged discriminatory appointments to boards and commissions by executive officers. In any event the basic question is the same, i.e., purposeful or intentional discrimination against blacks.

denied 434 U.S. 968 (1977), an access to political process case. In order to prevail it is not sufficient merely to show a racially disproportionate result or impact; the plaintiffs must show a purpose or intent to discriminate against blacks. See Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The recent Supreme Court of the United States decision in City of Mobile v. Bolden, __U.S.__, 100 S. Ct. __, 64 L.Ed.2d 47 (1980), clearly requires proof of a racially discriminatory purpose in a dilution case. This court notes that the Court held that the primary or sole focus of the inquiry must be on the intent of the political body creating the method of electing public officials. The plurality held that the evidence of intentional discrimination, which included the fact that no black had even been elected to

the City Commission and that there was a history of racial discrimination in Mobile, was insufficient to establish the requisite purposeful discrimination. An additional member, Justice Stevens, agreed that the proof of the requisite discriminatory intent was insufficient. Like in the City of Mobile case, the legislatively created method of electing the defendant board members is racially neutral and is not an impediment to a black being elected. As already noted, a black member has been elected. Furthermore, the plaintiffs' overall proof of discriminatory purpose is no greater than that found insufficient by the Supreme Court in City of Mobile. Accordingly, this court concludes that the plaintiffs have failed to prove that the self-perpetuating method of electing members of the defendant Board of Education was conceived or operated as a purposeful device to further racial

discrimination.[3]

Plaintiffs maintain that the self-perpetuating method of electing school board members is nevertheless unlawful under 42 U.S.C.A. §§ 1971(a)(1) and 1973, the Voting Rights Act. That Act applies only to public elections and the voting process. It does not even arguably apply to this self-perpetuating school board.

All relief prayed for by the plaintiffs is denied this 27th day of June, 1980.

SO ORDERED.

Wilbur D. Owens, Jr.
United States District
Judge

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3. Plaintiffs rely on the fact that the white only qualification in the Institute's charter was not removed until 1974 as direct evidence of discriminatory purpose in creating the method of electing the board. The white only terminology was in reality a dead letter for many years -- a relic of a bygone era. The inadvertent failure to remove the "white only" qualification like past discrimination "cannot, in the manner of original sin, condemn government action that is not itself unlawful." City of Mobile v. Bolden, supra, 64 L.Ed.2d at 63.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE *ELEVENTH CIRCUIT

No. 80-7517

D.C. Docket No. 79-67-MAC

GEORGE SEARCY, ETC., ET AL.,

Plaintiffs-Appellants,

versus

EUGENE C. WILLIAMS, ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

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Before MORGAN, RONEY and KRAVITCH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

September 21, 1981

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452--
October 14, 1980.

ISSUED AS MANDATE:

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

CIVIL ACTION NO. 79-67-MAC

GEORGE SEARCY, et al.,

Plaintiffs

V.

EUGENE C. WILLIAMS, et al.,

Defendants

JUDGMENT

Pursuant to the Opinion and Order of this court which was filed and dated June 27, 1980, and for the reasons stated therein,

JUDGMENT IS THEREFORE entered in favor of the defendants. All Relief prayed for by the plaintiffs is denied this 27th day of June, 1980.

GIRARD W. HAWKINS, Clerk

BY: ELAINE W. JONES

Deputy Clerk

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-7517

GEORGE SEARCY, VESTA HARP, MARTHA HARP, and VIVIAN C. YORK, individually and on behalf of all those similarly situated; and UPSON COUNTY CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE.

Appellants

v.

NEIL H. HIGHTOWER, individually; EUGENE C. WILLIAMS, JIMMY L. ROGERS, RONALD W. VAN HOUTEN, FRANK VARNER, JR., ED BELL and STEWART DAVIS, individually and as President and members of the Board of Education of the City of Thomaston; REV. WILLIS WILLIAMS, JR., in his official capacity only as a member of the Board of Education of the City of Thomaston; and their successors in office; and the BOARD OF EDUCATION OF THE CITY OF THOMASTON, GEORGIA.

Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the above named Appellees hereby appeal to the Supreme Court of the United States

from the Judgment of this Court, entered on September 21, 1981, reversing the decision of the United States District Court for the Middle District of Georgia, remanding said case to the District Court, and invalidating the statutes of the State of Georgia providing the method of selection of members of the BOARD OF EDUCATION OF THE CITY OF THOMASTON, GEORGIA, Ga. Laws, 1915, p. 848, Ga. Laws 1933, p. 1070, and Ga. Laws 1978, p. 3191.

This Appeal is taken pursuant to 28 U.S.C. §1254 (2), this the 9th day of October, 1981.

ADAMS, BARFIELD & DUNAWAY
ATTORNEY FOR APPELLEES

BY: /s/ Ronald Barfield
Member of Firm

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-7517

GEORGE SEARCY, VESTA HARP, MARTHA HARP, and VIVIAN C. YORK, individually and on behalf of all those similarly situated; and UPSON COUNTY CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE.

Appellants

v.

NEIL H. HIGHTOWER, individually; EUGENE C. WILLIAMS, JIMMY L. ROGERS, RONALD W. VAN HOUTEN, FRANK VARNER, JR., ED BELL and STEWART DAVIS, individually and as President and members of the Board of Education of the City of Thomaston; REV. WILLIS WILLIAMS, JR., in his official capacity only as a member of the Board of Education of the City of Thomaston; and their successors in office; and the BOARD OF EDUCATION OF THE CITY OF THOMASTON, GEORGIA.

Appellees

CERTIFICATE OF SERVICE

I certify that I have caused two copies of the within and foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES to be served on

Laughlin McDonald, attorney of record for Appellants, 52 Fairlie Street, N.W., Atlanta, Georgia 30303, by mailing said copies first class postage prepaid, addressed as aforesaid.

This 9th day of October, 1981.

/s/Ronald Barfield
RONALD BARFIELD

U. S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
OCT. 9 1981
NORMAN E. ZOLLER
CLERK

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
FEB 10 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1161

IN THE

Supreme Court of the United States

October Term, 1981

NEIL H. HIGHTOWER, ET AL.,
Appellants,

vs.

GEORGE SEARCY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

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QUESTIONS PRESENTED

I. Whether the unique, self-perpetuation method of choosing members of the Board of Education of Thomaston, Georgia, found by the Court of Appeals to be "tainted with a segregative origin. . . .[and] operated purposefully to further discrimination," was properly held unconstitutional?

II. Whether the Court of Appeals abused its discretion by remanding this case to the district court with orders to retain jurisdiction until a new, constitutional method of selecting Board of Education members was chosen?

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Other Authorities:

Handbook, What School Board Members Must Know, Georgia School Boards Association, Inc., Atlanta, 1978	1

MOTION TO AFFIRM

Appellees, pursuant to Rule 16, move that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed on the grounds that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

The self-perpetuation method of choosing the Appellant Board of Education of the City of Thomaston is unique in the State of Georgia. JSA, A-25 n.8.[1]

Education was traditionally provided to whites in Thomaston by a private, segregationist academy known as the R.E. Lee Institute, incorporated in 1906 expressly for the benefit and use of "white pupils and patrons." JSA, A-2. Blacks attended the

1. All other school boards are elected by popular vote, or are appointed by grand juries or city councils. One--and only one--is self perpetuating. Handbook, What School Board Members Must Know, Georgia Schools Boards Association, Inc., Atlanta, 1978, p. 7.

privately chartered Thomaston Starr School, "an educational institution for colored youths in the City of Thomaston." P.Exs. J, K.[1]

In 1915, the Georgia General Assembly established a public school sysyem in Thomaston. JSA, A-2. The enabling legislation provided that R.E. Lee Institute be absorbed into the public system,[2] and that the all white Board of Trustees of the former constitute the Board of Education of the latter. R.E. Lee Institute continued to exist both as a private, segregated entity,[3]

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1. "P.Ex." refers to Plaintiffs' trial exhibits.

2. I.e., "R.E. Lee Institute shall, so long as desired by its board of trustees, become a part of the public school system and be operated thereunder and share in its benefits, privileges, etc." P.Ex. E.

3. The word "white" was not deleted from the phrase "white pupils and patrons" in the R.E. Lee Institute charter until 1974. JSA, A-4.

as well as part of the public school system, and its Board of Trustees has continued to meet and transact business. JSA, A-3-4.[1]

The 1915 act establishing city schools further provided that all subsequent members of the Board of Education be members of the Board of Trustees of R.E. Lee Institute,[2] and that the membership of the Board of Education be self-perpetuating in the manner prescribed by the Charter of R.E. Lee Institute, to wit: "The election of the board of education shall be by the board, one member to be retired annually the last Friday in May, and not to be eligible for re-election within two years. Thereafter,

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1. In addition to revising its charter in 1978, P.Ex. F, the Board of Trustees has filed regular annual corporate reports with the State of Georgia, P.Ex. I, and has employed, together with the Board of Education, the Superintendent of city schools. P.Ex. L-8.

2. The requirement, but not the practice, of dual board membership was modified in 1978 when the City Charter
(Footnote continued on next page)

the term of office of each member being seven years from the date of his election." P.Ex. E.

For its entire 61-year history prior to the bringing of this lawsuit, not a single black was ever selected for membership on the Board of Education. JSA, A-15.[1]

(Footnote continued from preceding page) of Thomaston was amended giving the Board of Education the option of constituting the Board of Trustees of R.E. Lee Institute "so long as such board elects to do so." P.Ex. H.

1. Not surprisingly, the all white Board of Education resisted desegregation until forced by the Department of Health, Education and Welfare to dismantle its dual system in 1970. JSA, A-23, P.Exs. L-6, L-15, L-21-3, L-30, L-44-55, L-58. For a more detailed discussion of school desegregation in Thomaston, see infra, at 14-7.

It is undisputed in this record that there are qualified blacks in Thomaston willing to serve on the Board of Education. P.Ex. X.[1]

The complaint was filed on March 23, 1979 by black voters of Thomaston and the Upson County Chapter of the NAACP who contended that the method of selecting the Board of Education was in violation of the First, Thirteenth, Fourteenth and Fifteenth Amendments and 42 U.S.C. §§1971 and 1973. The district court concluded there was "insufficient evidence of purposeful discrimination, JSA, B-10, and denied relief. The court of appeals reversed.

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1. The first black was appointed to the Board of Education after this lawsuit was commenced, a fact upon which the court of appeals placed little significance: "rather than indicating a permanent change in the pattern that existed, the appointment of the black member suggests that indeed litigation was required to correct the situation." JSA, A-27 n. 9.

The panel found that: "This system for selecting school board members was tainted with a segregative origin," JSA A-24; the evidence of discriminatory administration was "overwhelming," JSA, A-18; and, the system "has clearly operated purposefully to further discrimination." JSA, A-25. Upon these facts, it concluded "that this unique system for selection of the school board that was operated in a discriminatory manner, together with the self-perpetuation of the Board of Education that originated from an all-white board of trustees, is violative of the appellants' rights under the Fourteenth Amendment." Ibid. The court remanded to the district court to supervise the adoption of a new, constitutional method for selection of board members. JSA, A-31.

ARGUMENT

I.

THE COURT OF APPEALS FOUND THE SELF-PERPETUATION METHOD OF MEMBERSHIP SELECTION FOR THE BOARD OF EDUCATION TO BE PURPOSEFULLY DISCRIMINATORY BEFORE HOLDING IT UNCONSTITUTIONAL.

The decision of the court of appeals is plainly correct, and not in conflict with any opinions of this Court.

The lower court held that the self-perpetuation method of selecting members of the Board of Education was appointive rather than elective, and that as a consequence, City of Mobile v. Bolden, 446 U.S. 55 (1980), while "relevant," JSA, A-22, was not wholly analogous.[1] Nonetheless, the court, consistent with City of

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1. The particular facts of this case, however, as the court of appeals noted, distinguish it from the usual case involving discretionary political appointments by an elected official or officials
(Footnote continued on next page)

Mobile, found that the selection method at issue was both conceived and was being operated purposefully to discriminate against blacks, JSA, A-24-5, prior to holding it unconstitutional.[1]

A. The Self-Perpetuation System Was Conceived in Part Purposefully to Discriminate.

Discriminatory purpose need not "be express or appear on the face of the statute," Washington v. Davis, 426 U.S. 229, 241

(Footnote continued from preceding page) appointed by an elected official, "to respond to the mandate of his constituency." Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974): "the appointment system in this case is particularly unique in that once the initial Board 'appointment' was made, the subsequent appointments to the Board were totally removed from public influence." JSA, A-21 n.6.

1. City of Mobile, supra, 446 U.S. at 66, makes clear that discrimination either in the inception or operation of an apportionment plan will render it unconstitutional. Both forms of unlawful state action were found by the court of appeals to be present in this case.

(1976)[1], nor must it be proved "that the challenged action rested solely on racially discriminatory purposes." Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977). Minorities need show only "that a discriminatory purpose has been a motivating factor." Ibid., at 266; City of Mobile, supra, 446 U.S. at 71 n.17, quoting Personnel Adm'r of Mass. v. Feeney, 422 U.S. 256, 279 (1979)(discriminatory purpose

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1. The panel noted that "this system. . .was created from a board of trustees that was arguably required by charter to be all-white, and at least under the facts necessarily would have been all-white " JSA, A-25 n.8 (emphasis in original), but declined to rule the 1915 statute facially unconstitutional because it contained no specific requirement "that the board be composed only of white members." JSA, A-7. However, like the election statutes found to be facially unconstitutional in Smith v. Allwright, 321 U.S. 649 (1944) and in Guinn v. United States, 238 U.S. 347 (1915), the statute here "endorses, adopts and enforces" private discrimination. Smith v. Allwright, supra, 321 U.S. at 664. Specifically, the self-perpetuation requirement mandates a direct, (Footnote continued on next page)

"implies that the decisionmaker. . .selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.")(Emphasis added.)

The court of appeals acknowledged that while "discriminatory purpose was most likely not the sole purpose in establishing this method of selection for the Board," JSA, A-24 (emphasis added), "the historical evidence in this case of a segregated school system existing at the time this legislation created the school board out of a white private school indicates in the least that the system for selecting school board members was tainted with a segregative origin." JSA, A-24.[1]

(Footnote continued from preceding page) unconstitutional link between past and present Boards. Appellees contend that the decision below should be affirmed on the additional ground of the facial invalidity of the statute. Hankerson v. North Carolina, 432 U.S. 233, 240 n.6 (1977).

1. As the court observed, "this taint was not present in City of Mobile." Ibid.

Elsewhere the court found that the self-perpetuation system was "'born in the iniquity' of a segregated school system," JSA, A-17, and had upon it "the taint of the segregative past." JSA, A-30. None of these findings are challenged by Appellants as clearly erroneous.

Having found one of the purposes in establishing the present board selection system was racially discriminatory, the court of appeals properly held the 1915 legislation unconstitutional. Indeed, under City of Mobile and other decisions of this Court, it was absolutely required to do so. Brown v. Board of Education, 347 U.S. 483 (1954).

B. The Self-Perpetuation System Was Operated Purposefully to Exclude Blacks.

The alternate basis for the court of appeals' decision was that the self-perpetuation "system has clearly operated purposefully to further discrimination."

JSA, A-25. The court found that no blacks had been chosen for board membership in a 61-year period--the entire life of the board prior to the filing of this lawsuit, JSA, A-15--and that this "overwhelming statistical evidence," JSA, A-18, was "highly indicative of discrimintory administrative action." JSA, A-15. The court relied principally upon Yick Wo v. Hopkins, 118 U.S. 356 (1886), and Turner v. Fouche, 396 U.S. 346 (1970), in evaluating its factual findings,[1] but the court's reasoning, and its conclusion, are wholly consistent with every other decision of this Court requiring proof of purpose to establish a constitutional violation.

In Washington v. Davis, supra, 426 U.S. at 242, this Court held that invidious purpose may often be inferred from "the fact, if it is true, that the law bears

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1. "[U]nder the analysis of the discriminatory administration cases, the present case involves an unexplained prima facie case of discrimination." JSA, A-15.

more heavily on one race than another." In accord, City of Mobile v. Bolden, supra, 446 U.S. at 70. Here, the court of appeals found the evidence of discriminatory administration of the statute to be "overwhelming." JSA, A-18.

This Court has also consistently held that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." Columbus Board of Education v. Penick, 443 U.S. 449, 464 (1979). Also see Dayton Board of Education v. Brinkman (Dayton II), 443 U.S. 526, 536 n.9 (1979)("proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose.") The lower court characterized the present selection system as "isolated from public pressure," JSA, A-27 n.9, and noted that "a few [white] families in Thomaston dominated the membership of the Board

throughout the years." JSA, A-5 n.1. Not only do these factors of isolation and family dominance, as well as self-perpetuation, enhance the opportunity for racial discrimination, they have the ineluctable, foreseeable consequence of excluding blacks from board membership. Since Appellants could reasonably foresee that the maintenance of the present method of selecting Board of Education members would exclude blacks, the finding of discriminatory purpose by the court of appeals is properly sustainable.

This Court has also held that the "historic background" of a decision is highly probative of discriminatory intent, "particularly if it reveals a series of official actions taken for invidious purposes." Village of Arlington Heights v. Metropolitan Housing Dev. Corp., supra, 429 U.S. at 267. The historic background and evidence in this case of official discriminatory acts by the Board of

Education is particularly strong. Black schools traditionally opened later and closed earlier than white schools. P.Ex. L-21, L-22, L-58. The Negro Training School was not accredited. P.Ex. L-23. Local officials expressed their official concern for keeping black schools in repair in 1965, because of "the present [school desegregation] situation in Georgia." P.Ex. L-30. The board operated a segregated system not only in primary and secondary schools, but in its other educational programs. In 1943, the board agreed to build a memorial library "for the use of white persons only; and. . .by white members of the public." P.Ex. L-6. In 1965, the superintendent reported that the Adult Academic Education Program was being conducted on a racially segregated basis. P.Ex. L-15. The board's hiring practices were racially biased as well. The principal of R.E. Lee Institute requested the

superintendent in 1950 to hire as head janitor "perferably [sic] a white man who can plan and supervise the janitors." P.Ex. L-16. In 1956, the superintendent recommended that a "Negro maid" be hired "who would service the girls' restrooms." P.Ex. L-17. The board opposed the desegregation of schools. In 1956, the superintendent ceased deducting National Education Association dues from teachers' checks "[s]ince the NEA has taken a stand against segregation." P.Ex. L-14. Public schools were not desegregated until 1970, more than 15 years after the decision in Brown v. Board of Education, supra; and only after the Department of Health, Education and Welfare found the board in "probable noncompliance" with Title VI of the Civil Rights Act of 1964 in: "Faculty desegregation, Student desegregation, Free choice failed to adequately desegregate your dual system, Segregated busing patterns, [and]

Failure to implement specific assurances." P.Ex. L-47. Even when desegregation was finally enforced, "the school traditions of the all-white schools, including the name R.E. Lee Institute, were adopted over those of the former all-black school." JSA, A-4.

At the time of trial, there were no black principals, assistant principals, department heads or clerical and office staff employed by the board, employment of blacks being limited to classroom teachers and maintenance staff. P.Ex. N.

As this record discloses, there were "many crossroads where the Board could either turn toward segregation or away from it." Columbus Board of Education v. Penick, supra, 443 U.S. at 463 n.12. It consistently took the path of segregation. Such evidence, alluded to by the court of appeals as part of the "taint" of segregation, is highly probative of purposeful discrimination in adoption and operation of the board

membership selection system in this case. Village of Arlington Heights, supra, 429 U.S. at 267.[1]

The lack of an adequate, non-racial reason for use of the particular member selection system challenged here is further proof of invidious purpose, "particularly if the factors usually considered important by the decisionmakers strongly favor a

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1. "The legislative or administrative history may be relevant" in determining whether an enactment is purposefully discriminatory. Village of Arlington Heights, supra, 429 U.S. at 268. While there is little strictly legislative history of the 1915 enactment in this case, i.e., contemporary statements by members of the board, reports, etc., the court of appeals found that one of the purposes in establishing the public school system and the Board of Education was to rescue the all-white R.E. Lee Institute from "its failing financial status." JSA, A-2. Thus, the historical record of the act under scrutiny reveals that the motivation and purpose of local officials in establishing the board and its unique method of self-perpetuation was to allow whites to continue to maintain a system of segregated education.

decision contrary to the one reached." Village of Arlington Heights, supra, 429 U.S. at 267. As noted, supra, the City of Thomaston is the only jurisdiction in the State of Georgia which selects its school board members by self-perpetuation. Its rejection of the factors considered important by every other school system in chosing a method of selecting board members is surely probative of invidious purpose.[1]

The decision below of unconstitutionality rests upon specific findings of discriminatory purpose in the conception and maintenance of the present board selection system. Those findings are wholly supportable by the evidence and are entirely consistent with the opinions of this Court concerning the relevance and methods of proof of purposeful discrimination in constitutional challenges.

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1. Not only did the court of appeals find no legitimate, non-racial reason for maintaining the present system, it
(Footnote continued on next page)

II.

THE COURT OF APPEALS PROPERLY ENJOINED FURTHER USE OF THE UNCONSTITUTIONAL STATUTE AND REMANDED TO THE DISTRICT COURT FOR SUPERVISION OF A REMEDY.

Having found that the 1915 statute providing for self-perpetuation of the Board of Education was adopted in part purposefully to discriminate against blacks, i.e., the statute was "tainted with a segregative origin," JSA, A-24, the court of appeals properly declared it unconstitutional and enjoined its further use. Such a procedure has been consistently followed by this Court. Brown v. Board of Education, supra; Lee v. Washington, 390 U.S. 333 (1968); Smith v. Allwright, 321 U.S. 649 (1944); Louisiana v. United States, 380 U.S. 145, 154 (1965)("Little if any objection

(Footnote continued from preceding page) repeatedly condemned it, as we have seen, as "isolated from public influence," JSA, A-31 n.12, and dominated by a handful of local white families. JSA, A-5 n.1.

is raised to the propriety of the injunction against further use of the interpretation test as it stood at the time this action was begun, and without further discussion we affirm that part of the decree."). See also, Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960), quoting from Western Union Telegraph Co. v. Foster, 247 U.S. 105, 114 (1918)("Acts generally lawful may become unlawful when done to accomplish an unlawful end."), and City of Richmond v. United States, 422 U.S. 358, 378 (1975)("An official action. . .taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution.").

The court of appeals properly concluded that this was not a case in which a statute was racially neutral both on its face and in its inception, and which could thus be administered in a constitutional

manner.[1] In order to eliminate the invidious purpose and effects of the statute, the lower court found it necessary to enjoin the act's further use.

> [T]his statute. . .originated out of a segregated school system and required that the initial Board of Education be established from an all-white school's board of trustees. The segregative effect of the past has been perpetuated by this statute that permitted the original all-white Board absolute discretion in choosing its own new members. . . In order to dissipate the taint of the segregative past in this unique system of school board selection, we find it necessary to reverse the district court and invalidate this statute. JSA, A-30.

The case was remanded to the district court for supervision of a new selection system.

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1. Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970), is therefore inapposite. There, this Court noted that "there is no suggestion that the law was originally adopted or subsequently carried forward for the purpose of fostering racial discrimination." Ibid., 396 U.S. at 336. Here, by contrast, the court of appeals made both the findings absent in Carter.

The court of appeals did not abuse or exceed its equitable powers. Indeed, this Court has cautioned that "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, supra, 380 U.S. at 154 (emphasis added). In exercising equitable powers, the "remedy is to be determined by the nature and scope of the constitutional violation." Milliken v. Bradley, 433 U.S. 267, 280 (1977), citing Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). As importantly, "the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Ibid., quoting from Milliken v. Bradley, 418 U.S. 717,

746 (1974)(Milliken I)(emphasis in original). And once a violation is proved, the power "to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Ibid., 433 U.S. at 281, quoting Swann, supra, 402 U.S. at 15.

The court of appeals made a specific finding that "the only effective remedy in this case is to invalidate the statute." JSA, A-29. Given the applicable standards for judging the appropriateness of equitable decrees, it cannot be said that the court abused its discretion or exceeded its powers.

CONCLUSION

Wherefore, Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and move that the opinion and judgment of the court of appeals be affirmed.

Respectfully submitted,

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